Manitoba

Annual Report 1987 - 88

Manitoba Labour Board

For the Fiscal Year Ended March 31, 1988

90-00670/

Manitoba

Minister of Labour

Legislative Building
Winnipeg, Manitoba, CANADA
R3C 0V8

The Honourable George Johnson,
Lieutenant-Governor of Manitoba,
235 Legislative Building,
Winnipeg, MB.
R3C 0V8

Your Honour:

I have the honour to present to you the Annual Report of The Manitoba Labour Board, covering the period from April 1, 1987, to March 31, 1988.

Sincerely,

E Connery

Ed Connery,
Minister.

Manitoba

Deputy Minister of Labour

Winnipeg, Manitoba, CANADA
R3C 0V8

Honourable Ed Connery,
Minister of Labour,
156 Legislative Building,
Winnipeg, MB.
R3C 0V8

Dear Sir:

I have the privilege to present to you the Annual Report of The Manitoba Labour Board, covering the period from April 1, 1987, to March 31, 1988.

Respectfully submitted,

Tanner Elton,
Deputy Minister of Labour.

Manitoba

Labour

The Manitoba Labour Board

404 Power Building
428 Portage Avenue
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(204) 945-3783

Honourable Ed Connery,
Minister of Labour,
156 Legislative Building,
Winnipeg, MB.
R3C 0V8

Dear Sir:

It is my pleasure to present to you the Annual Report of The Manitoba Labour Board, covering the period from April 1, 1987, to March 31, 1988.

Respectfully submitted,

J.M.P. Korpesho,
Chairperson.

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INTRODUCTION

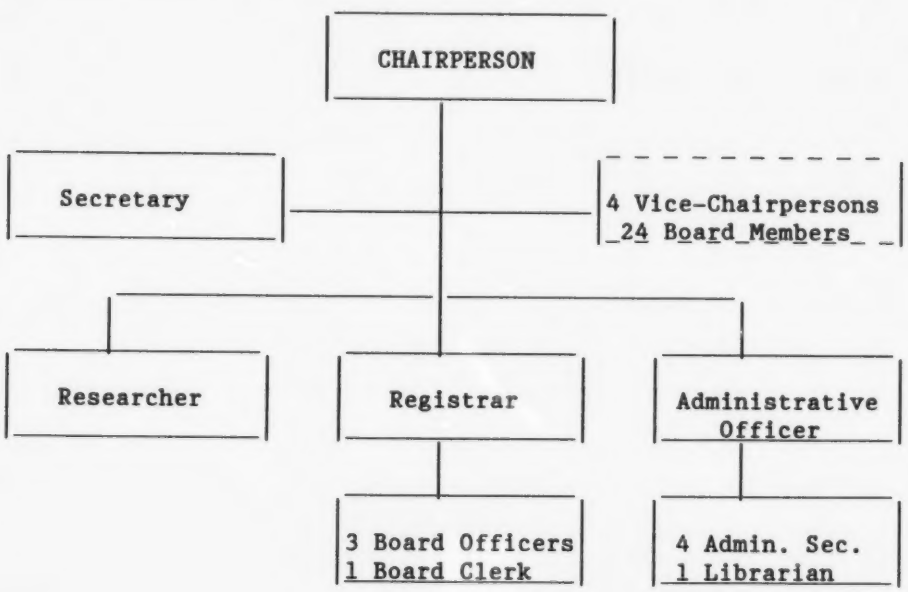
Role and Structure

The Manitoba Labour Board is responsible for the adjudication of matters referred under The Labour Relations Act, The Workplace Safety and Health Act, and The Pay Equity Act. The Board also acts as a wages board or the adjudicating body for the administration of The Payment of Wages Act, The Employment Standards Act, The Construction Industry Wages Act, The Vacation With Pay Act, and The Remembrance Day Act.

The Labour Board is a quasi-judicial body comprised of a full-time Chairperson, four part-time vice-chairpersons, and 24 part-time members. There is equal representation of employer and employee views.

Although the Board conducts numerous formal hearings annually, a significant portion of the Board's workload is administrative in nature. Where possible, the Board encourages the settlement of disputes in an informal manner by appointing one of its board officers to assist the parties in resolving outstanding issues and complaints.

Organization Chart



Administrative Services

The Administrative Officer is responsible for the administrative support of the Board Office including fiscal control and accountability for operational expenditures, office systems, procedures development and management to ensure the departmental and government policies are implemented.

The Board had an administrative support staff of five full-time and two part-time staff.

Field Services

The Registrar is the official responsible for the supervision of the day-to-day field services of the Board. All applications filed with the Board pursuant to The Labour Relations Act are initially processed through the Registrar's Office. The Registrar determines the hearing dates, assures the effective and efficient processing of each application and communicates with all parties in all matters relating to the scheduling of hearings or specific problems in the processing of any applications.

The Board has a field staff of three Board Officers and one Board Clerk who report directly to the Registrar. On a rotating schedule, two Board Officers are assigned to deal with Labour Relations cases, while the third Board Officer is assigned to deal with Payment of Wages/Employment Standards related matters.

The Board Officers conduct investigations with respect to various applications filed with the Board. Board Officers are frequently appointed to act as Board Representatives in allegations of unfair labour practices, to endeavour to effect a settlement of the complaint. They also perform a variety of functions including acting as Returning Officer in Labour Board conducted votes, attending Board hearings, as well as assisting the Registrar in the processing of applications.

This reporting period saw recruitment of the Board Clerk. This newly created position is responsible for the day-to-day processing of all Payments of Wages/Employment Standards referrals, hours of work exemption requests and Expedited Arbitration applications.

Manitoba Labour Board Library

The Labour Board maintains a small collection of texts and journals dealing with industrial relations and labour law. Since 1985, all arbitration awards and collective agreements must be filed with the Manitoba Labour Board. Copies of such material may be viewed at the Board's office.

It should be noted that access to these materials is limited to the Board premises. Library hours are Monday to Friday, 8:30 a.m. to 4:30 p.m.

Counsel to the Manitoba Labour Board

The Attorney-General's Department provides counsel to the Board who is responsible for providing the following support:

- legal assistance as required by the Board in matters such as legal research, opinions and the development and updating of the various forms used by the Board.

- representing the Board's interests in proceedings before the Courts.

- summarization and headnoting of all Board's Reasons for Decision, as well as ensuring the Board's Researcher prepares headnotes for arbitration decisions.

IN REVIEW

TOTAL NUMBER OF APPLICATIONS FILED WITH THE MANITOBA LABOUR BOARD

APRIL 1st - MARCH 31st

	1985/86	1986/87	1987/88
UNDER THE LABOUR RELATIONS ACT	388	470	466
UNDER THE EMPLOYMENT STANDARDS ACT	347	377	438
UNDER THE PAYMENT OF WAGES ACT	423	360	377
UNDER THE VACATIONS WITH PAY ACT	2	2	3
UNDER THE WORKPLACE SAFETY & HEALTH ACT	8	53	9
	1,168	1,262	1,293

Since 1985/86, there has been an 11% increase in cases filed. The most significant increases were pursuant to The Labour Relations Act and The Employment Standards Act, over the 2-year period. From 1986/87, there has been an increase of 2% in the total number of cases filed. There were changes enacted to the legislation in 1985 and the impact of these changes resulted in a greater number of applications filed in 1986/87.

TOTAL NUMBER OF APPLICATIONS DISPOSED OF BY THE MANITOBA LABOUR BOARD

APRIL 1st - MARCH 31st

	1985/86	1986/87	1987/88
UNDER THE LABOUR RELATIONS ACT	388	448	442
UNDER THE EMPLOYMENT STANDARDS ACT	327	372	410
UNDER THE PAYMENT OF WAGES ACT	366	350	347
UNDER THE VACATIONS WITH PAY ACT	3	1	4
UNDER THE WORKPLACE SAFETY & HEALTH ACT	7	50	11
	1,091	1,221	1,214

Over the two-year period from 1985/86, there has been an 11% increase in number of cases disposed of. The most significant increases were again pursuant to The Labour Relations Act and The Employment Standards Act and are in direct relation to the increase in cases filed. From 1986/87, there has been a 1% decrease in the number of cases disposed of by the Board.

MEMBERS OF THE BOARD

In the year under review, the Board consisted of the following members.

CHAIRPERSON:

John Korpesho was appointed Chairperson of the Board in 1983. He has been with the Board since 1973, during which time he has held the positions of Board Officer, Registrar, and Vice-Chairperson/Registrar. He has served on a number of Labour Management committees and is a graduate of the University of Manitoba certificate program in Public Administration.

VICE-CHAIRPERSONS:

S. Glenn Sigurdson, Q.C. was first appointed a member and Vice-Chairperson of the Board in 1980 on a part-time basis. He is a partner in the law firm of Taylor, Brazzell and McCaffrey.

Diane E. Jones was appointed a member and Vice-Chairperson of the Board in 1985. Until 1984, she practiced law with the firm of Aikins, MacAulay and Thorvaldson.

Joy M. K. Cooper was appointed a member and Vice-Chairperson of the Board in 1985. She is a partner in the law firm of Cherniack Allen Cooper.

Lawrie Cherniack was appointed a member and Vice-Chairperson of the Board on January 4, 1988. He is a partner in the law firm of Cherniack Allen Cooper.

BOARD MEMBERS - EMPLOYER REPRESENTATIVES:

A. Edward Stanton was appointed to the Board in 1985. He was employed by PRG Industries until his retirement in 1982.

Bob Sparrow was first appointed to the Board in 1983. He brings with him an extensive knowledge of the hospitality industry and currently is the President of the Manitoba Hotel Association.

Frank Van Ginkel was first appointed to the Board in 1978. He has been involved in the construction industry for the greater part of his career.

Denis E. Sutton joined the Board in 1983. He is Vice-President of Industrial Relations for the Manitoba Telephone System.

Elizabeth M. Black was appointed to the Board in 1985. She has held several management positions in the personnel field and is currently employed with Touche Ross Management Consultants.

W. J. Ptolemy was first appointed to the Board in 1978. He operated his own architectural specialty supply firm, Warren & Matheson Ltd.

Jack McCormick was first appointed to the Board in 1977. Now retired, he is a former Senior Vice-President of Bristol Aerospace Ltd.

Carole N. Postnieks was appointed to the Board in 1987. She is the manager of human resources with Guertin Bros. Coating & Sealants Ltd.

John D. Read was appointed to the Board in 1987. He is currently Executive Vice-President of the Manitoba Hotel Association.

James R. Conner was appointed to the Board in 1987. Now retired, he was previously in the industrial relations field with Hudson's Bay Mining and Smelting Company Limited, in Flin Flon, Manitoba.

Raymond N. Winston was appointed to the Board in 1987. He is currently Executive Director of the Manitoba Fashion Institute, Inc.

BOARD MEMBERS - EMPLOYEE REPRESENTATIVES:

William F. Iverson has served on the Board since 1970. Now retired, he was Business Manager for the Bricklayers Masons Independent Union of Canada Local, since 1967.

John E. Pullen joined the Board in 1978. He is Director of Operations with the Manitoba Government Employees' Association.

Bernie Atamanchuk was appointed to the Board in 1985. He is a Union Representative with the Manitoba Food and Commercial Workers Union, Local 832.

Leo Desilets was appointed to the Board in 1985. He is the Business Manager and Financial Secretary for the Sheet Metal Workers International Association.

Karen Graham joined the Board in 1985. She is an International Representative for the Amalgamated Clothing and Textile Workers Union.

Maureen Morrison joined the Board in 1983. She is a Staff Representative for the Canadian Union of Public Employees.

Hugh McMeel was first appointed to the Board in 1983. He is a Union Representative for the United Food and Commercial Workers International Union, Local 111.

Anne Cyr was appointed to the Board in 1983. She is the Business Manager for the Service Employees International Union.

Ronald J. Henderson was appointed to the Board in 1969. He is the former Regional Director of the Canadian Union of Public Employees.

J. Arthur Coulter has served on the Board since 1980. He has been involved in the labour movement for over 40 years in both elected and appointed positions.

Brian Hunt joined the Board in 1983. He has been a member of the United Steelworkers of America since 1969, serving as an Organizer and more recently a Staff Representative.

NEW APPOINTMENTS:

Doug McFarland was appointed to the Board in 1988 as an Employee representative. He is a Staff Representative with the Manitoba Government Employees' Association in Brandon.

S. Jo Lopuck was appointed to the Board in 1988 as an Employer representative. She had been self employed in the construction industry for a number of years prior to her appointment to the Board.

SUMMARIES OF SIGNIFICANT BOARD DECISIONS

1. DECISIONS RENDERED PURSUANT TO THE LABOUR RELATIONS ACT

CASE NO. 110/87/LRA
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 111 and SPRINGHILL FARMS LIMITED and SPRINGHILL FARM EMPLOYEES' UNION

Reasons for Decision dated April 16, 1987

The Applicant, the United Food and Commerical Workers (U.F.C.W.) filed an application for certification for a bargaining unit consisting of the employer's production employees at Neepawa, Manitoba plant, with certain exclusions. Some 9 days later, the Intervenor/Cross-Applicant Springhill Farm Employees' Union (Springhill) filed a Notice of Intervention as well as a cross-application for certification of a unit consisting of all non-management employees of the employer's processing plant. The Applicant, U.F.C.W. contended, inter alia, that Springhill was not a union within the meaning of The Labour Relations Act, as it was dominated by the employer.

Approximately one and one-half months later, an application was filed with the Board alleging that U.F.C.W. had engaged in improper bargaining tactics in the solicitation of membership evidence, with various remedies being sought thereof.

As a result of the various applications, the Board was faced with and therefore disposed of the following issues:

(1) The effect of the application filed by Springhill on the application for certification filed by U.F.C.W. some 9 days earlier.

(2) The ascertainment of the level of support for the application filed by U.F.C.W.

In respect of the first issue before it, the Board noted the definition of "union" as appearing in section 1(x) of The Labour Relations Act. It also reviewed a number of cases dealing with intervenor and union status in certification proceedings, and following these authorities and various authoritative texts on the subject, concluded that in order to determine union status, a number of steps had to take place and be seen as part of the same occurrence:

(a) The constitution should be placed before a meeting of employees for approval (the constitution to include the regulation of labour relations, membership eligibility, and the procedure for the election of officers and calling of meetings).

(b) Employees attending such a meeting should be admitted into membership or their previous membership should be confirmed.

(c) The constitution should be adopted and ratified by those members.

(d) Officers should be elected pursuant to the constitution.

After reviewing the evidence heard and material filed in relation to the status of the Springhill Union, the Board found that the first time that:

a. A constitution was placed before a meeting of employees.

b. Applications for membership were made.

c. A constitution was adopted or accepted by a vote of those employees in attendance.

d. Officers were elected pursuant to the constitution.

was at the January 30, 1987 meeting of the Springhill Union. In the result, the Board was satisfied that as of the date of filing by the Applicant, U.F.C.W. of its application for certification, the Springhill Union was not a "union" within the meaning of the Act, nor did it as of that date have any members in good standing as contemplated by The Labour Relations Act. The Board was therefore satisfied that the Springhill Union had no status with respect to the proceedings dealing with the application for certification filed by U.F.C.W., and ruled that if the U.F.C.W. application failed, the Board would then consider the application filed by the Springhill Union in the chronological order in which it was received.

In respect of the second issue before the Board, namely the level of support enjoyed by the application filed by U.F.C.W., and after review of a number of Labour Board jurisprudential authorities, including the Manitoba Labour Board's own decision in International Woodworkers of America, Local -- 324 vs. Fin Mac Lumber Limited et al dated March 18, 1985, and in view of the material filed by the Applicant U.F.C.W., the Board was satisfied that 55% or more of the employees in the Unit applied for wished to have U.F.C.W. represent them as their bargaining agent.

In respect of the application filed alleging improprieties in solicitation of membership by the Applicant U.F.C.W., the Board, after considering the evidence and argument presented, concluded that there was no basis for any of the allegations made and accordingly dismissed this application. The Board further took the opportunity to draw to the attention of the parties section 21(1) of The Labour Relations Act providing

for the filing of written complaints in respect of unfair labour practices, and indicated that in the future it would take a hard look as to whether or not the intent of this provision was being adhered to or abused.

In all of the circumstances, the Board therefore granted certification of the Application U.F.C.W.

CASE NO. 567/87/LRA
MANITOBA GOVERNMENT EMPLOYEES' ASSOCIATION and LEGISLATIVE ASSEMBLY MANAGEMENT COMMISSION

Majority Reasons for Decision dated February 24, 1988
Minority Dissenting Reasons dated March 8, 1988

An application was filed for certification for a bargaining unit consisting of all employees of Hansard Services of the Legislative Assembly, with certain exclusions. A reply on the grounds that The Labour Relations Act did not apply to the Legislative Assembly nor to its employees, thus rendering the Board without jurisdiction to consider the matter, was filed by the Respondent employer whom the parties submitted to be described as the "Legislative Assembly Management Commission".

In dealing with the issue of whether the Board had jurisdiction to deal with the application for certification before it, the Board first considered the relationship that existed between the Legislative Assembly Management Commission and the Legislative Assembly itself. The Board noted the provisions of The Legislative Assembly Management Commission Act setting out the duties of the Commission and its role in serving the Legislative Assembly. Having found the Assembly and the Assembly Management Commission to be indistinguishable, and further that an employer/employee relationship existed between the Commission and the employees engaged to carry out the support function of the Assembly, the Board then went on to consider whether this was an employer-employee within the jurisdiction of The Labour Relations Act and the Manitoba Labour Board.

The Board considered relevant provisions of The Labour Relations Act, and The Interpretation Act, and was of the view that the Assembly was not included in the definitions of "government", "Government of Manitoba", "the Crown", etc. for the very reason that the Assembly was not limited to those elected representatives to form the government or the Crown, but rather included all members who were elected to represent the people of the province of Manitoba. Thus, the reference in section 3 of The Labour Relations Act to the Crown being bound by the Act referred to the Government of Manitoba and not the Legislative Assembly and its Management Commission.

The Board also considered a decision of the Federal Court of Appeal in House of Commons and Canada Labour Relations Board et al (1986) 27 D.L.R. (4th) 481, and was of the view that the rationale in that case was applicable herein in that the Legislative Assembly enjoyed the same privilege as Parliament in the employment and control of its staff. It also noted that subsection 4(3) of The Labour Relations Act provided that the said Act was subject to The Civil Service Act, and in particular its definition of "civil service", and was satisfied that the employees contemplated by the application for certification fell within the exclusionary provision provided for in that definition.

The Board also considered whether subsection 4(1)(a) of The Labour Relations Act contained the necessary inclusionary provision necessary to abrogate a privilege enjoyed by the Legislative Assembly to appoint and control its own staff. In the Board's view however, subsection 4(1)(a) did not satisfy this criterion, as it did not specifically refer to the employees of the Legislative Assembly.

Accordingly, the majority of the Board concluded that it did not have jurisdiction to deal with the application for certification, and therefore dismissed same.

In the view of the minority dissenting decision, the member disagreed with respect to the Board's ruling that section 3 of The Labour Relations Act related to the Government of Manitoba and not the Legislative Assembly and its Commission. In his view, and in reliance on passages from the House of Commons decision of the Federal Court of Appeal, Hansard staff were quite simply employees of the Crown and therefore bound by The Labour Relations Act. Furthermore, it was the view of the minority that section 4(3) of The Labour Relations Act was introduced into the Act for recognition of the multiplicity of bargaining units in the various acts (Fire Departments Arbitration Act, Civil Service Act, City of Winnipeg Act), and was not introduced for the express purpose of excluding employees from becoming organized. In the dissenting member's view, given the considerable change in The Labour Relations Act in recent years, it was never the intent to exclude the Legislative Assembly staff from The Labour Relations Act.

CASE No. 1207/87/LRA
THE MANITOBA GOVERNMENT EMPLOYEES' ASSOCIATION, PROVINCIAL AUDITOR (PROVINCE OF MANITOBA) AND A GROUP OF OBJECTING EMPLOYEES

Reasons for Decision dated March 17, 1988

The Applicant (M.G.E.A.) applied for certification of a bargaining unit consisting of all Auditors Levels I, II, III and IV employed by the Provincial Auditor of the Province of

Manitoba. The Provincial Auditor requested the exclusion of Auditors Level III and IV from the unit on the basis that these employees were performing managerial functions primarily, and therefore fell within the contemplation of the so-called "management exclusion" set forth in the definition of "employee" under The Labour Relations Act.

The Board received several Affidavits from a group of objecting employees. The Applicant union took the position that the employees had no standing to give evidence in the proceedings by affidavit or otherwise unless they could establish that they fell within the contemplation of subsection 38(2) of The Labour Relations Act, and submitted that the evidence tendered did not relate to matters touching upon "intimidation, fraud or coercion or the threatened imposition of a pecuniary or any other penalty". Upon consideration of that preliminary matter, and in light of the affidavit evidence tendered, the Board ruled that the objecting employees had no standing in the proceedings pursuant to subsection 38(2) of the Act.

The Board went on to consider the matter of Auditors Levels III and IV of the Provincial Auditor who were known as "Audit Managers" and who exercised supervisory functions in respect of audit teams assigned to complete auditing assignments within the public sector. The question for the Board's determination was whether or not these audit managers performed "management functions primarily" as set forth in subsection 1(k)(i) of The Labour Relations Act, when read in conjunction with subsection 2(2) of the Act. The latter provision made it clear that the duties and functions of an employee may include supervising other employees, and the fact that an employee was exercising supervisory functions, in and of itself, did not constitute exercising management functions for the purpose of the Act. It was further noted that the "management exclusion" has qualified management functions, using the word "primarily".

After reviewing and considering Labour Board jurisprudence from Ontario and under the Federal jurisdiction, and comparing same to the Manitoba legislative situation and considering the evidence tendered, the Board found that the managerial functions of the audit managers were at most a balance between "professional" and "managerial" responsibilities, and could not conclude that the auditors were performing managerial functions "primarily", being the test under The Labour Relations Act.

Noting that it was for the Board to determine the application of a managerial exclusion in the context of a determination as to whether it would be "unfair to that person, the employer, or a union to include that person in a unit for collective bargaining purposes", the Board then considered the employer's concerns that a conflict of interest would be created by the

inclusion of the Level III and IV audit managers in the bargaining unit.

On the evidence, the concern about a potential conflict of interest essentially was limited to the question of the Auditors, Level III and IV, completing Performance Appraisals on the Auditors Level II. On balance, the Board concluded that it was satisfied that it was more appropriate for the Auditors Level II to be included in a unit with their auditing counterparts in Levels III and IV than elsewhere, nor would any unfairness to the employer, the employees or the union result within the meaning of the Act.

In the circumstances, the application for certification was granted, the Board retaining jurisdiction for a final determination as to the description of the unit if certain uncertainties were not resolved by the parties themselves.

CASE NO. 1248/87/LRA
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 111 and GELCO EXPRESS LTD. and A GROUP OF OBJECTING EMPLOYEES

Reasons for Decision dated March 23, 1988

The Union filed an application for certification of a unit of employees of the employer consisting of all its employees at Brandon, Manitoba, with certain exclusions. In response, the employer took the position that the persons in the unit for which an application was filed were all "independent contractors" and accordingly outside the scope of The Labour Relations Act and the jurisdiction of the Board.

The issue before the Board therefore, was whether the courier drivers, "owners/operators" as they were described, were within the contemplation of the definition of "employee" as that term was defined in the Act, specifically section 1(k) thereof.

The Board considered the evidence of the witnesses called by the parties, as well as the documentary evidence including the form of written agreement entered into between the employer and the owner/operator setting forth terms and conditions of the latter's engagement to perform services for the employer. As well, the Board considered the payment schedule providing for payment for services by the employer to each owner/operator in respect of the various courier services performed. The Board also noted the existence of a provision in the written agreement between the employer and owner/operators, providing that the sole relationship between the parties was that of principal and independent contractor, rather than any relationship of employer/employee, etc. The Board noted however, that how the parties may have defined

their relationship contractually did not answer conclusively the question as to whether the Board, on review of all the relevant facts, should characterize the relationship between the employer and its owner/operators as that of employer/employee within the meaning of the Act, or as independent contractor.

The Board considered various decisions of the Courts and other Labour Boards touching on the issue, as well as definitions in the current Manitoba legislation, the former legislation and definitions of "employee" and "dependent contractor" in Ontario. The Board was of the view that the current definition of "employee" under The Labour Relations Act had the effect of expanding and not restricting the definitional scope of "employee" under the Act, noting that the term "employee" meant a person employed to do work and included "any person designated by the Board as a employee for the purpose of the Act, ...", and further provided that this designation as an "employee" may be made "notwithstanding that the person to whom the employee provides services is not vicariously liable for the employee's acts or omission, ...".

After considering the issue of vicarious liability as it related to determination in common law of whether an employer/employee relationship existed, the Board noted that the "control" factor typically was given special emphasis in drawing the boundary line of vicarious liability in any particular case. In essence the "control" factor answered the question "who is entitled to give orders as to how the work is to be done?". In this context, the Board noted that the parties, in the written agreement, had anticipated the possibility of liability vicariously attaching to the employer by way of an indemnification to be obtained by the employer from the various owner/operators. Considering the effect of the "notwithstanding" proviso contained in the definition of "employee" in The Labour Relations Act, the Board was of the view that the effect of the provisions was to empower the Board to designate, for the purposes of the Act, persons as employees who, but for the legislation, would not be considered employees at law. The recent amendment vested in the Board a discretion to designate persons to be included in the definition of "employee" under the Act, in contrast with the previous legislation which limited "employee" to persons employed to do work which was deemed to include a class of person described as dependent contractors. This legislative initiative no doubt was in response to the difficulties involved in drawing free and clear boundary lines around the concept of "employee", "dependent contractor", and "independent contractor" and in determining the classification of persons into those categories in specific factual circumstances. The effect of the legislative change was to transform the jurisdictional hemisphere of the Board from a determination as to classification into an exercise of discretion. Thus, whenever a person's status was in doubt, the Board was given the discretionary power to decide whether

the person should be considered an "employee" for the purpose of enabling the latter to engage in the "practice and procedure of collective bargaining" in accordance with the intention of The Labour Relations Act as recited in the preamble thereto. In exercising its discretion to designate a person as an "employee" under the Act, the Board was of the view that it should have regard to an assessment of the particular circumstances of the relationship in each case against the backdrop of whether or not it presented an appropriate context for the practice and procedure of collective bargaining. While the board would continue to have regard to the same facts within their labour relations context, it would do so under a different legislative mandate that empowered it to designate, not to classify -- to exercise a discretion, and not to determine a classification. The Board further agreed with the view that in the final balance, it would have to be satisfied that the relationship before it, even though it may not bear all of the hallmarks of the typical employment relationship, more closely resembled the relationship of an employee to employer than that of an independent contractor.

In the circumstances before it in this case, the Board was satisfied that the relationship between the employer and the owners/operators more closely resembled the relationship of employer/employee that than of independent contractor. The matter of ownership and maintenance of a vehicle, viewed in the context of all the facts, was not a sufficient basis on which to characterize the relationship as that of independent contractor. Upon all of the circumstances, the Board noted that the relationship of the owners/operators to the employer was one of economic dependence as opposed to independence, for the employer was the controlling and sole force determining their economic lives. While some aspects of the relationship viewed out of the contextual focus implied independence, the Board exercised its discretion to designate with regard to the whole of the relationship and not parts thereof.

Having concluded that the owners/operators were employees within the meaning of The Labour Relations Act, and in view of the necessary support present, certification was granted for the unit in accordance with the application.

CASE NO. 243/87/LRA
INTERNATIONAL LADIES GARMENT WORKERS UNION LOCAL 286 (ILGWU) and STERLING STALL GROUP and its related companies including LANTRY LEATHER LTD. and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION LOCAL 459 (ACTWU)

Reasons for Decision dated November 26, 1987

This case involved a dispute between the two unions, namely the ILGWU and the ACTWU, over jurisdiction regarding certain employees of Sterling Stall Group and its related companies.

Historically, the ACTWU was certified by the Board in 1973 as bargaining agent for employees of Lantry Leather Ltd. The employees of Sterling Stall Group were represented by the ILGWU as a result of a voluntary recognition by the employer. In 1981, Sterling Stall bought all the shares of Lantry Leather Ltd. Over the next few years, several shifts in location of employees of Sterling Stall and Lantry Leather occurred, resulting, amongst other things, in the creation of a combined cutting department consisting of employees of Sterling Stall and Lantry Leather. Following the creation of this combined cutting department, the ILGWU took the position that a new bargaining unit had been created and that there should be a determination of which union had jurisdiction as bargaining agent for that unit. That union then filed an application with the Board alleging that all the cutters from the two previously separated units had been "intermingled" by the employer and, pursuant to sections 47, 49 and 50 of The Labour Relations Act, requested a determination that the cutting department of the employer was a unit appropriate for collective bargaining, a vote to determine the wishes of the employees in the unit as to whether they wished the ILGWU or the ACTWU to be their bargaining unit, and a determination of the bargaining agent of the employees as a result of the determination of the wishes of the employees, etc. ACTWU alleged to the contrary that there had been no intermingling of the cutters from Sterling Stall and Lantry Leather. The employer was of the view that positions or rulings to be dealt with should be done with certainty so that the employer would know with whom it was dealing with as agent for the employees.

The Board first noted that it was without doubt that it had jurisdiction under The Labour Relations Act to determine the appropriate bargaining unit in this case and whether a vote should be taken. Provided it was established that the employees were intermingled under subsection 47(2)(c) of the Act, the Board would have jurisdiction to determine the matter. The Board noted however that the application was not made upon sale, but rather after the two cutting departments had physically merged. Thus, section 49 would apply provided that there was intermingling. Even if section 49 did not apply, subsection 50(1) would apply as it was obvious that the businesses herein were at least associated businesses within the meaning of subsection 50(1).

As to the question of whether there was an "intermingling", after noting the circumstances and the submissions made to it, the Board concluded that there had been virtually complete intermingling of the two groups, and certainly sufficient intermingling to give the award jurisdiction under subsection 47(2).

The next question then before the Board was what unit was appropriate for collective bargaining. The Board was of the view in the circumstances that it could not find the existing

bargaining unit structure to be appropriate. Indeed fragmentation within the same workplace, with workers doing the same job side by side should be avoided. Difficulties with respect to deduction and remission of dues and new employees were noted as well as considerable potential for problems arising out of the provision of the two different agreements.

The Board reviewed decisions of other Boards and authoritative commentary on the question of factors to enable it to determine an appropriate bargaining unit in the circumstances facing it in this matter. It particularly noted the views having been expressed that unless compelling reasons could be shown to justify the maintenance of separate bargaining units, employees performing the same job functions would be grouped into one unit. It further noted that a past history of workable industrial relations was just one factor to be pointed to in deciding whether to maintain existing bargaining units. The extent of intermingling seem to be a key factor, and in effect the greater the intermingling the less appropriate it would be to maintain separate bargaining units.

Therefore, in all the circumstances of the case the Board was unable to see the existing bargaining unit structure as appropriate and determined that the more recently created cutting department represented a well defined group of employees who shared a distinct common interest, which should be in the same bargaining unit.

The Board then considered who should represent the merged bargaining unit. The Board was of the view that nothing constructive would be accomplished by conducting two separate votes with respect to the employees of Lantry Leather and Sterling Stall. Separate votes would be inconsistent with its interpretation that this was a single unit appropriate for collective bargaining, and could result in a continued bifurcation of the employees between bargaining units, a result considered to be undesirable and inconsistent with the general direction of Labour Board policy. Even more fundamentally, the Board doubted its jurisdiction under the Act to order a separate vote. In the circumstances, the Board believed the appropriate method to be a single vote amongst all the affected employees.

CASE NO. 403/87/LRA
CANADIAN UNION OF EDUCATIONAL WORKERS LOCAL 9 and UNIVERSITY OF MANITOBA and HARKNESS

Reasons for Decision dated March 14, 1988

The applicant union asked the Board to determine, pursuant to section 121.2(5)(a) of The Labour Relations Act, whether Mr.

Harkness was an "employee" within the meaning of subsection 1(k) of the Act, given that he was serving as a member of the Board of Governors at the University of Manitoba.

It was argued on behalf of the applicant union that the appointment of Mr. Harkness to the Board of Governors did not affect his status as an employee covered by the bargaining unit, that he was employed as a lecturer and that any management functions he might exercise on the Board of Governors were not part of his employment as contemplated by subsection 1(k) of the Act. Counsel on behalf of the Respondent University argued that it would be unfair to include Mr. Harkness in the bargaining unit, and that the Board should give a broad and remedial interpretation to subsection 1(k) and thus exclude Mr. Harkness.

Upon review of the application, replies, evidence, exhibits and all submissions by the parties, the Board concluded that Mr. Harkness, solely by virtue of his appointment to the Board of Governors was not an "employee" during the ter. of his appointment to the Board of Governors of the University, and the current collective agreement did not apply to him during the term of his appointment. He accepted the University's position that although Mr. Harkness as an individual member of the Board was not an employer, by virtue of a statutory appointment he became a member of the Board and fulfilled the employer functions at the highest level, it would be unfair to the employer to include such an individual in the bargaining unit. Thus the fact that Mr. Harkness as an individual did not, as an example, directly employ a particular person, he nevertheless functioned as a member of the statutory body vested with plenary powers as an "employer". Given the types of decisions and overall responsibility which the Board of Governors was charged with, the Board considered it unlikely that Mr. Harkness could wear the hats of both the employee and the employer comfortably or with ease. The Board noted that this was not just a situation where the University had sought out "employee directors". The Board further noted that the University's position with respect to previous appointments similar to Mr. Harkness' reflected its long standing opposition to a person sitting on the Board of Governors and being a bargaining unit member.

2. DECISIONS RENDERED PURSUANT TO THE PAYMENT OF WAGES ACT

CASE NO. 858/87/PWA
DAVID J. JOHNSTON T/A JOHNSTON VENTURES LTD. and CLIFFORD H. MULLIN

Reasons for Decision dated January 27, 1988

The Employee was hired by the Employer to haul fertilizer and to work in the Employer's warehouse during the fertilizer application season. He alleged that he had not been paid overtime rates of pay due on his term of employment. The Employee's hours of work were to be 40 hours per week.

The Employer testified that the rate of pay was to include all hours worked and that the rate was to be based on at least a sixty-hour work week. No daily records were kept as the Employer alleged that overtime work was to be done on a voluntary basis.

The Board, in considering the matter, stressed to the Employer that the responsibility of keeping records of daily hours of work rested with the Employer and not with the Employee. Further, the Board indicated that at the outset of employment, the terms and conditions should be set out, clearly indicating the number of hours of work and the rate of pay. The Employer's practice of establishing a monthly rate of pay for "any and all hours worked" was not acceptable to the Board. In the absence of sufficient evidence to the contrary, the Board was satisfied that the rate of pay was based on a forty-hour work week. Accordingly, the Employee's claim for unpaid wages was allowed.

CASE NO. 1032/86/PWA
SUNSET PLUMBING & HEATING LTD. and G. PAUL LANTHIER

Reasons for Decision dated May 11, 1987

The essence of the Employee's claim was that he had been paid substantially less than he was entitled to, pursuant to The Construction Industry Wages Act. He claimed to have been a journeyman sheet metal worker, and as such, was entitled to a minimum rate of $18.90 per hour, and not $12.00 per hour as he had been paid. Evidence indicated that the Employee did accept the lesser rate of pay as he had been out of the trade for some time.

The Board noted that the wages for a journeyman sheet metal worker, as prescribed by the regulations, was $18.90 per hour. Further, it (the Board) was satisfied that the Employee was a qualified journeyman sheet metal worker. Consideration was given to the fact that the Employee accepted the lesser

rate of pay and whether such acceptance barred him from advancing to the wages he had been entitled to under the Act. Reference was made to section 14(2) of The Construction Industry Wages Act, which states in part that:

> "14(2) The acceptance by an employee of wages at a rate lower than the minimum rate to which he is entitled under this Act or the regulations shall not be a defence
>
> (a) to an action by the employee to recover wages at the rates prescribed in the regulations ..."

The Board concluded that the Employee was within his rights to advance a claim to the wages to which he had been entitled, even though he did accept a lower rate of pay than that stipulated in the Act.

The claim for unpaid wages was allowed.

CASE NO. 1021/86/PWA
RODERICK I. A. SMITH, BEING A DIRECTOR OF JACOBSEN ELEVATOR BUILDERS LTD. and CLAUDE GEUGEUN

Reasons for Decision dated May 15, 1987

A claim for outstanding wages had been brought against the named Director of the Company. He contented that although he had been a Director of the Company, he had not been active in the day to day operations of the firm, nor did he exercise any control or direction over its affairs. The Director thus disputed the Employee's claim on the basis of the former being "non-active".

The Board found that the Employer remained and had been a Director of the Company at all material times during the Employee's employment with the Company. Further, the Board was satisfied that the provisions of section 5 of The Payment of Wages Act did not make a distinction between active and non-active Directors. In the result, the Director was ordered to pay to the Employee the outstanding wages that were owing to him.

CASE NO. 197/87/PWA
BRIAN McCASKILL, CARRYING ON BUSINESS UNDER THE TRADE NAME AND STYLE OF EXECUTIVE DRYWALL CO. and MAURICE CAMPBELL

Reasons for Decision dated May 28, 1987

The Claimant was hired by the Employer to assist in the installation of drywall. He brought a claim against the

Employer for unpaid wages. However, the Employer contended that the Claimant was an independent contractor, and as such, the latter's claim to further compensation was without merit.

The Board reviewed the issue of "independent contractor" status by applying the "control test" and the "organization test", to determine the employment status of the Claimant. The "control test" considered whether a claimant had been a free agent and/or had used his own discretion as to how to perform the work. The "organization test" sought to answer the question as to whether a person had been employed as an integral part of a business. An affirmative answer was taken to be indicative of a person being an employee.

On reviewing the facts, the Board was satisfied that the Claimant had been under the complete control, supervision and direction of the Employer. Further, the Claimant did not operate or solicit his own business. It was concluded that the Claimant was an employee and, as a result, his claim for unpaid wages was allowed.

CASE NO. 402/86/PWA
RIVER EAST SCHOOL DIVISION NO. 9 and DEBBIE SINCLAIR AND
CASE NO. 403/86/PWA
RIVER EAST SCHOOL DIVISION NO. 9 and CHRISTINA VIVIAN

Reasons for Decision dated June 24, 1987

Both Applicants were part-time teachers with the Division. They had identical complaints the essence of which was that the Employer refused to pay for time worked over and above that required of them by their contracts of employment. The basis for their complaints was clause 4(b) of their "Form 2A" contract which stated in part that:

> "... the days actually attended for teacher in-service, parent-teacher conferences, administration and pupil evaluation shall be allowed as if he or she had actually taught for the school board during those days."

The Applicants had attended at school on those days set aside for the purposes stated in the clause, but did not actually teach. It was those "non-instructional" teaching days which were at issue in this case.

The Board noted that the contract provided that teachers be paid an annual salary, determined by their contract and their collective agreements, without deductions, even though there were certain days when they had not actually taught. Evidence indicated that it was accepted that tasks performed on those days were part of a teacher's professional obligation for

which an annual salary was paid. The annual salary was intended to compensate teachers for fulfilling their professional obligations over the school year. In the result, the Board dismissed the claim of the Applicants.

CASE NO. 387/87/PWA
E. H. PRICE and LEN BERARD

Reasons for Decision dated February 19, 1988

The Employee normally would have been entitled to three week's vacation. He had been absent from work and had been on Workers Compensation for a major part of the vacation year, having been off work for a period of approximately 38 weeks, 20 of which had been in the 1985/86 vacation year.

After he returned to work the Employee, on the advice of the Employer, took another week off. That particular week off was regarded by the Employer, as "pay back" for the time in vacation pay the Employee had received. The Employee was not paid for that week and registered his complaint that he should be have been paid for same.

The Employer's objection to paying the Employee for that week in question related to the latter's lengthy period on Workers Compensation. The Employer argued that due to the Employee's absence, the latter was entitled to vacation pay of only 6 percent of his wages as provided for under subsection 11(2)(b) of The Vacation With Pay Act.

It appeared to the Board, that the policy underlying subsection 6(2) of The Vacation With Pay Act, was to recognize that time on compensation was not a holiday, and, therefore, time on compensation generally should be treated as time worked. The subsection did leave this to the Board's discretion. The Board ruled that the Employee should have been compensated for the one week's wages he would have received if he had been allowed to work.

DISSENT: The discretion given to the Board pursuant to subsection 6(2) of the Act should be exercised with due care and on the merits of the particular case before it (the Board). In the case in question, the period of absence had been a significant period of time, and so the Board should not have exercised its discretion in favour of the Employee.

CASE NO. 686/87/PWA
ARTHUR WILLIAM SPRIGGS, A DIRECTOR AND OFFICER OF DEBTGUARD CORPORATION and ROGER PROULX

Reasons for Decision dated January 27, 1988

The Employee had filed a claim against the Respondent, as a director and officer of the Employer, for outstanding wages. The issue that presented itself before the Board for a determination was whether a designated "attorney for service" was an officer or director within the meaning of section 5 of The Payment of Wages Act.

The Board reviewed an agreement between the Respondent and the Corporation which set forth the terms and conditions of the Respondent's employment relative to his appointment as General Manager of the Western Division of the Corporation. It appeared that no provision had been made in the agreement for the Respondent's appointment as an officer or director of the Corporation and, the clear implication of the language of the agreement was that the Respondent was not intended to be so appointed. The Respondent had agreed to act merely as "attorney for service", which, according to the agreement made him eligible to:

> "... accept service or process or being served therewith in any suit or proceeding and to receive all lawful notices, and for the aforesaid purposes to do all the acts relating to the matters within the scope of this power of attorney."

The Board was satisfied that the Respondent's appointment to aforementioned capacity did not fall within the contemplation of a "director or officer" within the meaning of the Act. Therefore, the claim for wages was denied.

3. DECISION RENDERED PURSUANT TO THE EMPLOYMENT STANDARDS ACT

CASE No. 1133/86/ESA
KILDONAN CAR & TRUCK PARTS and BRYAN GALBRAITH

Reasons for Decision dated June 19, 1987

The Employer charged that the Employee had terminated his employment without having given proper notice. As a result the former deposited in trust wages accruing to the Employee, to be held pending a decision.

The Employee worked for seven days after being hired, and did not return to work after the seventh working day. Meanwhile, the Employer had kept the Employee's position "open" for two weeks after which he hired a replacement. Some three weeks after, the Employee contacted the Employer and requested his pay cheque. The Employer claimed forfeiture of the Employee's wages as he took the position that although the latter had worked for less than two weeks, he, the Employer, had kept the latter's position "open" for more than two weeks, and, therefore, was entitled to notice.

The Board referred to subsection 35(1)(b) of The Employment Standards Act which provided that an employee may not terminate his employment unless notice is given to the employer. However, the Board further referred to subsection 35(2)(d) of the Act which provided that the provisions of section 35(1) did not apply where:

> "(d) the person employed terminated his employment, or his employment is terminated, during the first two weeks of his employment with that employer, unless the employer and the employee agree in writing that subsection (1) applies during that period."

The Board found no evidence to indicate that there was any agreement in writing between the parties that subsection 35(1) did not apply during the Respondent's first two weeks of employment. Further, it found that the Employee did in fact terminate his employment within the first two weeks. In the circumstances, the Board dismissed the Employer's claim for forfeiture, and ordered the Employee should receive his wages for the seven days that he worked.

SUMMARY OF SIGNIFICANT COURT DECISIONS

This decision was rendered during the last reporting period but was not received in time for inclusion in the 1986-87 Annual Report. It is included at this time:

ATTORNEY-GENERAL OF MANITOBA vs. METROPOLITAN STORES (MTS) LTD., MANITOBA FOOD AND COMMERCIAL WORKERS LOCAL 832 and THE MANITOBA LABOUR BOARD

Supreme Court of Canada
Reasons for Decision delivered March 5, 1987

The Manitoba Labour Board was empowered by The Labour Relations Act of Manitoba to impose a first collective agreement. When the Respondent Union applied to have the Board settle the terms and conditions of the first contract between it and the employer, the latter subsequently commenced proceedings in the Manitoba Court of Queen's Bench to have that power declared invalid as contravening the Canadian Charter of Rights and Freedoms. Within the framework of the Constitutional challenge, the employer applied by way of Motion in the Court of Queen's Bench for an Order staying the first contract proceedings of the Manitoba Labour Board until the issue of the legislation's validity could be heard. The Motion was denied by the Court of Queen's Bench, but the Manitoba Court of Appeal allowed the employer's appeal from the decision denying the stay Order and granted the stay. Further to leave to appeal having been obtained from the Supreme Court of Canada from the decision of the Manitoba Court of Appeal, the Supreme Court of Canada was faced with three issues, namely:

1. Whether the Court of Appeal erred in failing to recognize the presumption of constitutional validity pursuant to a Charter challenge to legislation.

2. Principles governing the exercise of a Court discretion in ordering a stay of proceedings until the constitutionality of impugned legislation had been determined.

3. Whether the intervention by the Manitoba Court of Appeal in the discretion exercised by the Queen's Bench Judge was appropriate.

In allowing the appeal, the Court first was of the view that the presumption of constitutional validity understood in the literal sense explained by the Court, and whether it applied to laws enacted prior to the Charter or after the Charter, is not compatible with the innovative and evolutive character of that constitutional instrument.

With respect to the second issue before the Court, three main tests for the granting of a stay of proceedings were reviewed, namely:

1. The preliminary assessment of the merits of the case which, in a case concerning a constitutional challenge of a law where the public interest would be taken into consideration in the balance of convenience, could be formulated as a "serious question" test.

2. The question of irreparable harm.

3. The balance of convenience, which would answer the question of which of the two parties would suffer the greater harm from the grant or refusal of an interlocutory injunction pending a decision of the Court on the merits of the constitutional challenge.

The Court noted that in respect of challenges to the constitutionality of legislation, and the consequences of an interlocutory injunction for parties to litigation as well as the public at large, it was evident that Courts ought not to be restricted to the traditional application of the balance of convenience. Rather it was necessary to weigh therein the public interest as well as the interest of the parties.

The Court held that in the circumstances of the case before it the Motions Court Judge in the Queen's Bench had applied the correct principles in taking into consideration the public interest and the impact of a stay of proceedings upon the Board, as well as the effect upon the parties. In its view, the Court of Appeal was not justified in substituting its discretion for that of the Motions Court Judge on the basis of new facts which were not before the latter. And secondly, the Court of Appeal did not exercise its fresh discretion in accordance with the principles set out by the Court, i.e. by considering the balance of convenience or the public interest as well as the interest of the parties.

Accordingly, the Supreme Court of Canada allowed the appeal and set aside the stay of proceedings ordered by the Manitoba Court of Appeal.

Y.M.H.A. JEWISH COMMUNITY CENTRE OF WINNIPEG INC. and BROWN ET AL and THE MANITOBA LABOUR BOARD

Court of Appeal Suite No. 57/86
Reasons for Decision delivered July 22, 1987

The issue raised by this appeal was whether the Manitoba Labour Board had jurisdiction to order the Y.M.H.A. Jewish Community Centre of Winnipeg Inc. to pay to the Director of Employment Standards Division an amount of money as wages owing certain workers who participated in a job creation project initiated by Y.M.H.A. with the Canada Employment and Immigration Commission under section 38 of The Unemployment Insurance Act.

In reviewing the facts and circumstances and the relevant legislation, the Court noted that the object of the job creation project was to offer persons unemployed and eligible to receive unemployment benefits the opportunity to gain work experience during their unemployment and also not to be inactive. Participation was voluntary and participants were free to withdraw at any time without notice and without affecting their right of continuing to receive Unemployment Insurance benefits. While participating, the U.I. benefits were enhanced and paid by the Commission, except for a small top-up amount paid to each worker by Y.M.H.A. pursuant to the agreement between it and the Commission. All monies received by the workers were treated as Unemployment Insurance benefits.

It was the court's view that the Board had no jurisdiction to intervene and enhance the benefits payable to workers participating in the job creation program by invoking provincial wage laws. Although noting that the agreement between Y.M.H.A. and the Unemployment Insurance Commission referred to Y.M.H.A. as employer, in the court's opinion that did not automatically make the workers employees, much less employees governed by provincial wage laws. The Court therefore held that having regard to the governing statute and the agreement between Y.M.H.A. and the Unemployment Insurance Commission, provincial wage laws were not applicable to workers participating in a section 38 job creation project, and thus the Board's order against Y.M.H.A. was to be quashed.

It should be noted that leave to appeal was sought from the Supreme Court of Canada from the decision of the Manitoba Court of Appeal. Pursuant to an application for leave brought before the Supreme Court of Canada on January 25, 1988, the Supreme Court of Canada granted leave to appeal from the decision of the Manitoba Court of Appeal on February 25, 1988. A date for hearing of the appeal is not known at this time.

IMPERIAL TAXI BRANDON (1983) LTD. and HUTCHISON and THE MANITOBA LABOUR BOARD et al

Court of Appeal Suit No. 505/86
Reasons for Decision delivered November 16, 1987

The Respondent Hutchison, an employee of the Appellant owner and operator of Taxi cabs, was not paid a wage in the sense of payment calculated during a particular period with reference to such period of employment. The employee instead was permitted to retain fares collected from those utilizing the taxi service and out of the gross income received, was required to pay to the taxicab operator an amount calculated with reference to the distance travelled with a paying passenger, as well as gasoline. During the relevant period of time the net amount retained by the employee in payment of his labour was less than the minimum amount which he was entitled to by statute if he were an employee under The Payment of Wages Act. Upon investigation of the matter, the Director of Employment Standards, having regard to the hours during which the Respondent/employee had been employed, determined wages owing to him for overtime, general holidays, and vacation pay. This total was calculated on the basis of minimum wage for the hours worked including overtime for the hours worked beyond the maximum permitted at standard rates in any week, as well as special pay for work performed on general holidays and allowance for annual vacation.

The Appellant taxi cab operator referred the Director's determination to the Board on the grounds that the Respondent/ employee was not an employee who received wages, but rather, an independent contractor who leased a taxi cab. After hearing evidence and reviewing relevant documentation, the Board decided that the Respondent was an employee entitled to wages under the legislation and ordered the taxi cab operator to pay to the employee a reduced sum of money. The taxi cab operator sought and was granted leave to appeal on the question of whether the Board erred in law in concluding that the Respondent was an employee entitled to wages under The Payment of Wages Act.

The Court of Appeal reviewed the relevant legislation i.e. Payment of Wages Act, Employment Standards Act, and Vacations With Pay Act and noted that each statute defines those encompassed by it in a slightly different way, and that each makes a distinction between an "employee" (encompassed by the legislation) and an "independent contractor", (not so encompassed). In the Court's opinion, the difference between an employee and an independent contractor lay in the degree of control which an employer may exercise. Within the guidelines set out by the Court as to the distinction, the question of whether a person was an employee or independent contractor was one of fact for determination by the Board, which is assigned this task not only as a finder of fact but also as an

implementor of legislative policy. In that role, the Board is not entitled to stray from the guidelines, but it is a sole arbitrator within them.

In the opinion of the majority of the Court, the Board decided the issue of employment in this matter within the guidelines, in accordance with appropriate legal tests, including the statutory purpose test and whether the Appellant taxi cab operator was carrying on business on his own behalf or for a superior.

The Court also noted that the Board considered in depth a decision of the Alberta Labour Relations Board which was overruled by the Supreme Court of Canada. However, the Court noted that the Board did so because of the similarity of facts and because the tests applied by the Alberta Board were the same as those appropriate in Manitoba. However, the Manitoba legislation relative to the definition of "wages" differed from that in Alberta, that in Manitoba not being predicated on remuneration flowing directly from an employer to an employee. Thus in the Court's view the Manitoba legislation encompassed remuneration received by an employee from anyone and had to be remuneration paid as a result of work done or services rendered under a contract with the employer who must be a person entitled to direct the employee as to the manner in which the work is done in pursuit of the employer's objectives. The majority of the Court therefore concluded that the receipt by a taxi driver of fares earned while driving a taxi cab owned and operated by another at whose direction the driver must await business was remuneration within the statute, and it was therefore open to the Board to make the finding that it did, without disturbing it.

Accordingly, the appeal of the taxi cab operator was dismissed.

CHRISTINA VANDERMEULEN and BETTY VANDERMEULEN and MANITOBA LABOUR BOARD, MANITOBA ORGANIZATION OF NURSES ASSOCIATIONS (CARMAN NURSES MONA LOCAL 89)
CARMAN MEMORIAL HOSPITAL

Queen's Bench Suit No. 87-01-22526
Reasons for Decision delivered February 11, 1988

The Applicants, being adherents of the Canadian Reformed Church of Carman applied to the Board for a determination that they were religious objectors within the meaning of section 68(3) of The Labour Relations Act so that the deduction from their wages for union dues could be paid to charity instead of the Respondent union.

The Applicants (and their Church) had, as articles of faith, the belief that they were precluded from being members of or

financially supporting any union. They were both licensed practical nurses who, in order to practice their profession pursuant to governing legislation, were members of the Manitoba Association of Licensed Practical Nurses. Neither the Applicants nor their Church had any religious objection whatsoever to membership in or in support of M.A.L.P.N.

Further to evidence and representations received from the Applicants and the Respondent union, the Board, expressing its regret, concluded that it was bound by its earlier decisions in Lumsden vs. United Steel Workers of America Local 6166, and Doerksen vs. Manitoba Organization of Nurses Associations (Killarney MONA Local 35). In these latter decisions the Board determined that unless there were religious principles prohibiting membership in both the union (MONA) and the professional body (M.A.L.P.N.), no exemption could be given under section 68(3) of The Labour Relations Act.

Further to a request for review and reconsideration of its decision which was declined by the Board, the Applicant applied to the Court of Queen's Bench for an order quashing the decision of the Board. The application to the Court of Queen's Bench was made on the grounds that the Board's interpretation of section 68(3) of The Labour Relations Act was patently unreasonable or alternatively that the Board acted beyond its jurisdiction by making orders in violation of the Canadian Charter of Rights and Freedoms.

The Court took the occasion to review Part IV of The Labour Relations Act in which sections 68(3) and 68(1) were found, under the heading "collective bargaining and collective agreements". The Court noted that any requirement as to membership in a union or a union-like association, which represents the interests of an employee in dealing with an employer, was necessarily a matter of concern to the Board, although conversely the legal obligation upon a professional employee to be a member of an organization created by public statute for the purpose of regulating education, admissions, and standard for the profession was irrelevant to the determination which the Board was called upon to make regarding religious exemptions. The Court further noted that the term "professional employee" as defined under section 1(t) of The Labour Relations Act employed the term "professional organization", whereas when the Act dealt with collective bargaining and exemption from check off or closed shop provisions, it used the words "professional association". The court therefore was of the view that in the context of section 68(3) or 68.1, this distinction was important, for to say then an exemption from the check off or closed shop provisions of a collective agreement must be based on a prohibition against membership in a profession made no sense at all. It would mean that no employed professional could ever claim a religious exemption. Furthermore, the Court was of the view that the interpretation adopted by the Board would discriminate as between the professional and non-professional employee.

In the circumstances, the Court concluded that in order to qualify for a religious exemption, there was no need for a prohibition to both membership in a union and membership in the statutory professional organization itself.

Accordingly, the orders of the Board were quashed.

TEULON WORKERS UNION et al and THE MANITOBA LABOUR BOARD

Queen's Bench Suit No. 87-01-23385
Reasons for Decision delivered February 15, 1988

The Applicant filed an application for certification with the Board seeking to have it certified as bargaining agent. In response to the application and material filed, the Board in its order found that it was not satisfied that the Applicant was a union within the meaning of section 25(1) of The Labour Relations Act and pursuant to sections 7(3) and 8(2) of Manitoba Regulation 65/85. Accordingly the application for certification was dismissed. Further to an application for review of the Board's order which it declined, the Applicant sought review of the Board's order in the Court of Queen's Bench, moving for the prerogative remedy of mandamus, alleging that the Applicant had met all of the documentary requirements of The Labour Relations Act, and therefore the Board had no discretion but to certify the Applicant as collective bargaining agent.

After reviewing the relevant principles of judicial review, as well as the material before the Court and the relevant legislation, the court took the opportunity to note that it had neither the role nor the jurisdiction to simply set aside a decision of the Board simply because the Court would have arrived at a different finding or result than the Board. In those circumstances, and given the remedies sought by the Applicant, the Board could not come to the conclusion that the Respondent Board failed to exercise its jurisdiction. While the Court, on a mandamus application, could order the Board to exercise its jurisdiction, the Court could not tell the Board how that jurisdiction should be exercised.

Accordingly, the Applicant's motion was dismissed.

GRIFFIN CANADA INC. and VINCENT and THE MANITOBA LABOUR BOARD

Court of Appeal Suit No. 271/87
Reasons for Decision delivered March 23, 1988

The collateral question that arose out of a dispute over wages between the employer and the employee was whether the Board

erred in law and acted in excess of its jurisdiction in not having constituted a quorum, for purposes of its hearing of the dispute between the said employer and employee, pursuant to section 120(7) of The Labour Relations Act. In other words, the Applicant challenged the Board's jurisdiction to establish a one member panel, other than the chairperson or a vice-chairperson, for purposes of adjudicating wage disputes under The Payment of Wages Act. If the constitution of the Board was to be determined by section 2 of The Payment of Wages Act then a non-chair member had the authority to decide a wages issue. If the composition of the Board however were to be determined by section 120 of The Labour Relations Act, that member did not therefore have the necessary authority to act alone.

After comparing the relevant legislation, and the fact that the Board was designated as a wages board for the purposes of section 2 of The Payment of Wages Act, the Court of Appeal concluded that the quorum requirements of The Labour Relations Act were indeed applicable, the quorum provisions of section 2 of The Payment of Wages Act only having been intended to apply to a wages board constituted under Section 2(1) of the said Act.

In the circumstances, the court ordered that the dispute between the employer and the employee be remitted to the Board for a rehearing before a properly constituted panel of the Board.

PUBLICATIONS

The Manitoba Labour Board presently publishes or makes available the following:

- "Compendium of Grievance Arbitration Decisions" - A publication summarizing all arbitration awards rendered in the Province of Manitoba and filed with the Board during the calendar year. The 1985 edition is available; the 1986 edition was drafted; 1987 edition was being compiled during the reporting period. Both of these latter editions will be available in the next reporting period.

- "Guide to The Labour Relations Act" - A booklet explaining in lay-persons' terms the various provisions of The Labour Relations Act, and the role of the Manitoba Labour Board and Conciliation and Mediation Services. (Available in both English and French)

- "Annual Report" - A publication disclosing the Manitoba Labour Board's staffing and membership, as well as highlights of significant Board and Court decisions, and statistical analysis of the various matters dealt with during the reporting period.

1987-88

EXPENDITURE SUMMARY

	Estimated Expenditures	Actual Expenditures	Variance
Salaries	$413.0	$398.5	$14.5
Operating Expenditures	$163.1	$160.1	$ 3.0
Total	$576.1	$558.6	

Explanations

The surplus in Salaries was due to delay in recruitment of vacant positions.

The surplus in Operating Expenditures was due to cost cutting measures implemented at the Board or deferring specific expenditures such as publications.

TABLE 1

STATISTICS RELATING TO THE ADMINISTRATION OF THE LABOUR RELATIONS ACT
BY THE MANITOBA LABOUR BOARD

APRIL 1st, 1987 - MARCH 31st, 1988

TYPE OF CASE	Cases Carried Over	Cases Filed	TOTAL	Disposition of Cases			Number of Cases Disposed of	Number of Cases Pending
				Granted	Dismissed	Withdrawn		
Application for Certification	11	91	102	65	8	8	81	21
Application for Revocation	2	15	17	12	1	2	15	2
Application for Amended Certificate	16	24	40	40	-	-	40	-
Application re: Unfair Labour Practice	13	60	73	3	5	47	55	18
Application pursuant to Section 16[1]	-	7	7	-	3	1	4	3
Application for Board Ruling	10	14	24	8	-	11	19	5
Application pursuant to Section 75.1[2]	2	10	12	1	-	7	8	4
Application pursuant to Section 10(1)[3]	1	4	5	-	-	5	5	-
Application pursuant to Section 10(3)[4]	-	11	11	11	-	-	11	-
Application for Reconsideration	2	9	11	2	7	1	10	1
Application for Successor Rights	-	1	1	-	-	1	1	-
Application pursuant to Section 68[5]	2	1	3	-	2	1	3	-
Application pursuant to Section 17[6]	-	1	1	-	-	1	1	-
Application for Consent to Prosecute	-	-	-	-	-	-	-	-
Application pursuant to Section 103(5)[7]	-	10	10	7	-	3	10	-
Application pursuant to Section 82.1[8]	-	13	13	5	-	-	5	8
Application pursuant to Section 58(3)[9]	-	1	1	1	-	-	1	-
Application pursuant to Section 62[10]	-	1	1	-	-	1	1	-
Application pursuant to Section 17(2)[11]	-	1	1	1	-	-	1	-
Referral for Expedited Arbitration*	17	192	209	-	-	-	171	38
TOTALS	76	466	542	156	26	89	442	100

* See Table 4

KEY TO FOOTNOTES FOR TABLE 1

1 Duty of Fair Representation.

2 First Collective Agreement.

3 When an application for certification is filed with the Board, changes in conditions of employment cannot be made without the Board's consent until the application is disposed of.

4 Within the first 90 days following certification of a union as a bargaining agent, strikes and lockouts are prohibited, and changes in conditions of employment cannot be made without the consent of the bargaining agent. Applications under this sub-section are for an extension of this period of up to 90 days.

5 Re: Religious Objector.

6 Re: Access Agreement.

7 Request for the Board to Appoint Arbitrators.

8 Final Offer Selection

9 Extension of time limit for Employee list

10 Complaint re: Ratification Vote

11 Permit

TABLE 2

STATISTICS RELATING TO THE ADMINISTRATION OF THE LABOUR RELATIONS ACT
RESPECTING CERTIFICATES ISSUED

APRIL 1st, 1987 - MARCH 31st, 1988

TYPE OF CERTIFICATE ISSUED	NUMBER OF CERTIFICATES ISSUED	NUMBER OF EMPLOYEES AFFECTED
NEW CERTIFICATES	65	2,171

TABLE 3

STATISTICS RELATING TO THE ADMINISTRATION OF THE LABOUR RELATIONS ACT
RESPECTING REPRESENTATION VOTES

APRIL 1st, 1987 - MARCH 31st, 1988

TYPE OF APPLICATION INVOLVING VOTE	Number of Votes Conducted	Number of Employees Affected by Votes	Number of Pre-Hearing Votes Counted	Applications GRANTED After Vote	Applications DISMISSED After Vote	Outcome Pending
Certifications	9	665	N/A	6	3	-
Pre-Hearing (Certification)	1	167	1	1	-	-
Revocation	9	149	N/A	9	-	-
Pre-Hearing (Revocation)	-	-	-	-	-	-
Termination of Bargaining Rights	-	-	N/A	-	-	-

TABLE 4

STATISTICS RELATING TO THE ADMINISTRATION OF THE LABOUR RELATIONS ACT
RESPECTING REFERRALS FOR EXPEDITED ARBITRATION

APRIL 1st, 1987 - MARCH 31st, 1988

Cases Carried Over	Number of Referrals Filed	TOTAL	Number of Cases Mediator Appointed	Disposition of Cases			Number of Cases Disposed of	Number of Cases Pending
				Settled by Mediation	Settled by Parties	Settled by Arbitration		
17	192	209	161	120	19	32	171	38

TABLE 5

STATISTICS RELATING TO THE ADMINISTRATION OF THE EMPLOYMENT STANDARDS ACT

APRIL 1st, 1987 - MARCH 31st, 1988

TYPE OF CASE	Cases Carried Over	Number of Applications Filed	Total	Rulings Made	Applications Withdrawn	Not Proceeded with By Applicant	Number of Cases Disposed of	Number of Cases Pending
Applications pursuant to Section 32	36	339	375	313	3	13	329	46
Applications pursuant to Section 35	14	99	113	73	8	-	81	32

TABLE 6

STATISTICS RELATING TO THE ADMINISTRATION OF THE PAYMENT OF WAGES ACT

APRIL 1st, 1987 - MARCH 31st, 1988

TYPE OF CASE	Cases Carried Over	Number of Applications Filed	Total	Orders Issued by the Board	Applications Withdrawn	Cases Disposed of	Cases Pending
Applications pursuant to Section 8	160	377	537	286	61	347	190

TABLE 7

STATISTICS RELATING TO THE ADMINISTRATION OF THE VACATIONS WITH PAY ACT

APRIL 1st, 1987 - MARCH 31st, 1988

TYPE OF CASE	Cases Carried Over	Number of Applications Filed	Total	Orders Issued by the Board	Claims Dismissed	Claims Withdrawn	Number of Cases Disposed of	Number of Cases Pending
Plant Vacation Shutdown	1	3	4	4	-	-	4	-

TABLE 8

STATISTICS RELATING TO THE ADMINISTRATION OF THE
WORKPLACE SAFETY & HEALTH ACT
BY THE MANITOBA LABOUR BOARD

APRIL 1st, 1987 - MARCH 31st, 1988

TYPE OF CASE	Cases Carried Over	Number of Applications Filed	Total	Orders Issued	Applications Withdrawn	Number of Cases Disposed of	Number of Cases Pending
Application for Remedy of Alleged Discriminatory Actions	-	4	4	1	2	3	1
Appeal from Director's Order	5	5	10	3	5	8	2

TABLE 9

FIRST AGREEMENT LEGISLATION
REVIEW OF CASES FILED
APRIL 1st, 1987 to MARCH 31st, 1988

	UNION	EMPLOYER	DATE OF APPLICATION	OUTCOME OF APPLICATION	CURRENT STATUS
Pending from last Reporting Period					
	Int'l Union of Engineers, L. 901 & Int'l B'hood of Electrical Workers, L. 2085.	M.W. Orbanski Ltd.	February 17, 1987	Parties voluntarily entered into a collective agreement. Expiry date: April 30, 1988.	First contract in effect. However, Employer is out of business and not operating. No negotiations underway.
New applications filed during this Reporting Period:					
1.	Manitoba Food & Commercial Workers, Local 832	The Portage la Prairie Mutual Insurance Company	May 25, 1987	Parties voluntarily entered into a collective agreement.	Expiry date: July 31, 1988.
2.	International Union of Operating Engineers, Local 901	Rural Municipality of Argyle	September 21, 1987	Board imposed first collective agreement.	Expiry date: November 18, 1988.
3.	International Union of Operating Engineers, Local 901	Rural Municipality of Dauphin	September 21, 1987	Parties voluntarily entered into collective agreement.	Expiry date: December 31st, 1988.
4.	United Food & Commercial Workers International Union, Local 111	Springhill Farms Limited	November 12, 1987	Parties voluntarily entered into collective agreement.	Expiry date: January 31st, 1991.
5.	Canadian Union of Public Employees, Local 2348	Manitoba Committee on Wife Abuse	November 25, 1987	Parties voluntarily entered into collective agreement.	Expiry date: December 31st, 1988.
6.	International Union of of Operating Engineers, Local 901	Rural Municipality of Birtle	January 5, 1988	Parties voluntarily entered into collective agreement.	Expiry date: December 31st, 1988.
7.	United Food & Commercial Workers International Union, Local 330W	Blackwoods Beverages Ltd.	February 18, 1988	Pending	
8.	Canadian Union of Public Employees, Local 3123	Bethesda Hospital & Personal Care Home	February 18, 1988	Parties voluntarily entered into collective agreement.	First agreement expires April 30th, 1988.
9.	International Union of Operating Engineers, Local 901	Rural Municipality of Oakland	March 23, 1988	Pending	
10.	International Union of Operating Engineers, Local 901	Rural Municipality of Lac du Bonnet	March 31, 1988	Pending	